

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LANSUPPE FEEDER, LLC,

Plaintiff,

vs.

WELLS FARGO BANK, NATIONAL
ASSOCIATION, as Trustee for Soloso CDO
2005-1 Ltd.,

Defendant,

and

SOLOSO CDO 2005-1 LTD.,

Nominal Defendant,

and

OXFORD UNIVERSITY BANK; CITIZENS
BANK & TRUST COMPANY; COASTAL
COMMERCE BANK; GUARANTY BANK
AND TRUST COMPANY; BANKFIRST
FINANCIAL SERVICES; THE FIRST, A
NATIONAL BANKING ASSOCIATION;
COPIAH BANK, NATIONAL ASSOCIATION;
& PRIORITYONE BANK,

Intervenors.

Case No. 1:15-cv-07034 (LTS)

**SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO INTERVENORS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Lansuppe Feeder, LLC (“Lansuppe”) respectfully submits this sur-reply in further opposition to the Intervenor’s Cross-Motion for Summary Judgment, dated October 5, 2015, in the above-captioned action.¹

ARGUMENT

In response to Lansuppe’s argument that the Intervenor’s cross-claims are barred by the statutes of limitations and repose, the Intervenor concedes that their cross-claims “would ordinarily be time-barred” (Dkt. No. 118, at 16), and have accordingly voluntarily dismissed their parallel action in the Northern District of Mississippi, which suffered from the same fatal flaw.² In a desperate attempt to avoid the same outcome here, the Intervenor try to restyle their cross-claims as recoupment counterclaims, which they argue are not subject to the statute of limitations. (*Id.*) This argument fails for two simple reasons: (1) the Intervenor’s cross-claims—which are offensive claims seeking affirmative relief—are clearly *not* recoupment counterclaims; and (2) in any event, the applicable statute of repose bars recoupment counterclaims.

A. The Intervenor’s Cross-Claims Are Not Recoupment Counterclaims

Recoupment counterclaims are defensive in nature and preclude affirmative relief. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415 (1998) (describing recoupment as a defense); *118 E. 60th Owners, Inc. v. Bonner Props., Inc.*, 677 F.2d 200, 204 (2d Cir. 1982) (“Courts in New York and elsewhere have emphasized the intrinsically defensive nature of the [recoupment] doctrine.”); *Ackerman v. Nat’l Prop. Analysts, Inc.*, 887 F. Supp. 494, 509-10 (S.D.N.Y. 1992) (“A necessary and important condition to a defendant’s right of recoupment is the actual filing of [claims against it].”).

¹ Capitalized terms used but not defined herein shall have the meaning set forth in Lansuppe’s Opposition to the Intervenor’s Cross-Motion for Summary Judgment (Dkt. No. 106).

² *See* Notice of Voluntary Dismissal, *Oxford Univ. Bank v. Wells Fargo Bank, N.A.*, No. 3:15-cv-00145-DMB-SAA (N.D. Miss. Nov. 25, 2015), ECF No. 11.

The Intervenor's cross-claims clearly fail to satisfy these requirements. There are no claims asserted against the Intervenor in this action in response to which they could file defensive recoupment counterclaims. Rather, the Intervenor seek here the same affirmative relief—an order declaring that the Issuer must register under the Investment Company Act and enjoining the Trustee from liquidating the Trust Estate (Dkt. No. 56-2)—they previously sought in their initial suit against the Trustee in the Northern District of Mississippi, which Intervenor now concede was untimely and have voluntarily dismissed. (Dkt. No. 8-5, at 13.)

B. The Intervenor's Cross-Claims Are Nevertheless Barred By The Statute of Repose

Even if the Intervenor could restyle their affirmative cross-claims as recoupment counterclaims at this late stage (which they cannot), the applicable statute of repose extinguished the rights underlying those claims after three years. *See P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004) ("Unlike a statute of limitations, a statute of repose is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit."). Statutes of repose bar even recoupment counterclaims. *See Beach*, 523 U.S. at 417 (holding recoupment counterclaim barred by a statute of repose, which "govern[s] the life of the underlying right as well"). The Intervenor do not contest that the three year statute of repose limitations period is applicable. Consequently, the rights underlying any recoupment counterclaims the Intervenor may have had expired years before the start of this action.

CONCLUSION

For the foregoing reasons as well as those raised in its initial opposition brief (Dkt. No. 106), Lansuppe respectfully submits that the Intervenor's Cross-Motion for Summary Judgment should be denied.

DATED: New York, New York
December 3, 2015

Respectfully submitted,

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